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No. 89-265

In The

Supreme Court of the United States

October Term 1989

EASTON PUBLISHING COMPANY

Petitioner,

vs.

ALFRED R. BOETTGER

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES W. ELLIOTT*
THOMAS R. ELLIOTT, JR.

POSWISTILO, ELLIOTT & ELLIOTT
Suite 201
1101 Building
11th and Northampton Streets
Easton, PA 18042
(215) 258-2374

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a state statute which creates a civil cause of action for unlawful disclosures of State-intercepted wire communications may be constitutionally applied to a newspaper which obtains intercepted telephone conversations through the illegal conduct of a third person and publishes them.

2. Whether the governmental interest in utilizing electronic surveillance for law-enforcement purposes is an interest of sufficient weight so as to justify limits on press disclosure and publication of intercepted telephone conversations obtained by a newspaper as a result of the unlawful act of a third person.

3. Whether a state statute which requires as an element of a civil cause of action proof of "willful" violation thereof, and prohibits use or disclosure of private telephone conversations, imposes strict liability in the form of an irrebuttable presumption of invasion of privacy.

RESPONDENT'S OBJECTION TO JURISDICTION IN RESPONSE TO PETITIONER'S SUPREME COURT RULE 21.1(b) AND 28.1 STATEMENT AND TO PETITIONER'S JURISDICTIONAL STATEMENT

The Petitioner failed to raise the issue of the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act until after the decision of the trial court, when it first challenged the constitutionality in its post-trial motions filed in the Court of Common Pleas of Northampton County, Pennsylvania. This failure resulted in the waiver of the issue by the Petitioner. See *Boettger v. Loverro*, 349 Pa. Super. 134, 502 A.2d 1310

RESPONDENT'S OBJECTION – Continued

(1986), rev'd on other grounds ___ Pa. ___, 555 A.2d 1234 (1989) as follows:

> Appellant has from the outset, in its answer, and throughout, in its motion for summary judgment, requested points for charge, and motion for judgment n.o.v., argued that it is exempt from liability under section 5725. In making this argument, appellant has cited the Fair Report Privilege recognized in the Restatement (Second) of Torts §611 (1976). Appellant has not, however, presented its constitutional argument with equal consistency; although making the argument in its motion for judgment n.o.v., appellant did not make it in either its pleadings or its requested points for charge. Accordingly, as such, the constitutional argument has not been preserved.

Moreover, the Petitioner elected to dissolve and did dissolve itself while the case was on appeal within the Pennsylvania court system. The judgment entered against Petitioner in this action was paid to Respondent on April 20, 1989 pursuant to a writ of execution which was filed on March 27, 1989. The only apparent parties in interest are the shareholders of the former newspaper publisher, who have a speculative interest in the recovery of the judgment previously paid, but no concrete interest in the First Amendment issues raised by Petitioner's petition for writ of certiorari.

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SUMMARY OF ARGUMENT

The case is not appropriate for review. The constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act was raised too late by petitioner. The judgment against the petitioner was paid, and the petitioner is now dissolved.

Moreover, the decision which petitioners seek to have reviewed does not depart from settled First Amendment principles nor is it in conflict with prior decisions of this Court. To the contrary, no prior decisions have considered the substantial federal and state interests in the governmental authorization of electronic surveillance, which are directly implicated here.

Given those substantial federal and state interests in the continued availability of wiretapping as an effective instrument of law enforcement, and the serious risk that federal and state legislative authorizations will *all* be challenged, and ultimately fall, with the unconstitutionality of the inseparable limits on use and disclosure, this Court should deny review in this case. In any event, these interests are of sufficient magnitude to justify the imposition of civil damages for the willful violation by the press of a prohibition – which applies to the government and the general public as well as to the press – from using and disclosing the contents of intercepted wire communications except upon court order or when introduced as evidence in a criminal proceeding.

ARGUMENT

I. NO GRANT OF WRIT OF CERTIORARI IS WARRANTED BECAUSE THE DECISION OF THE PENNSYLVANIA SUPREME COURT DOES NOT DEPART FROM SETTLED FIRST AMENDMENT PRINCIPLES NOR CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner Easton Publishing Company ("the Newspaper") urges upon the Court an absolutist view of First Amendment press publication rights that this Court has repeatedly eschewed, particularly in cases involving another fundamental right of constitutional dimension: the right of privacy.

The Newspaper's claim of entitlement – an absolute right which rises above the rights of all other members of the public to publish even private telephone conversations obtained by the Newspaper as a result of the unlawful act of another – sweeps far more broadly than any First Amendment principle enunciated by this Court. It would also corrode the stronghold of privacy which the Pennsylvania Legislature carefully constructed in its decision to confer upon the State the awesome power to electronically intercept private telephone conversations.

The Newspaper claims that this case is controlled by the line of cases whose progenitor is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and that it "departs dramatically from well-settled First Amendment principles". Petition for Writ of Certiorari ("Pet. for Cert.") at 8. This claim – as overbroad as the publication rights for which the Newspaper contends – is simply inconsistent

with this Court's repeated admonition that in cases involving the tension between First Amendment press rights and the protection accorded by law to personal privacy the Court was "resolving this conflict only as it arose in a discrete factual context". *The Florida Star v. B.J.F.*, ___ U.S. ___, 57 U.S.L.W. 4816, 4817 (1989); *see also, Cox Broadcasting, supra,* 420 U.S. at 491 ("Rather than address the broader question . . . it is appropriate to focus on the narrower interface between press and privacy that this case represents."); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 840 (1978)("The broader question – whether the publication of truthful information withheld by law from the public domain is similarly privileged – was not reached in Cox . . . We need not address all the implications of that question here, but only whether in the *circumstances of this case* Landmark's publication is protected by the First Amendment" [emphasis supplied]).

In fact, as we discuss below, the decision of the Pennsylvania Supreme Court is not inconsistent with any prior decision of this Court. Instead it represents, as Justice White noted in his *Florida Star* dissent, a proper striking of the balance between press rights and the right of privacy. *See, Florida Star, supra,* 57 U.S.L.W. at 4823, n.4.

A. THIS CASE IS NOT CONTROLLED BY OR INCONSISTENT WITH THE COX BROADCASTING COMPANY LINE OF CASES.

We begin by carefully analyzing *Cox Broadcasting,* rather than merely invoking it in an *ipse dixit* fashion, as did the Newspaper. The Georgia statute in *Cox Broadcasting* made it a criminal offense "for any news media or any other person to print and publish, broadcast, televise or

disseminate through any other medium of public dissemination" the names or identities of female rape victims. In the course of publicly open criminal proceedings against several accused persons, a television reporter obtained information concerning the crime and, in addition, learned the name of the victim by inspecting the indictment itself, which was a public record routinely made available for public inspection. The reporter later broadcast a news report which revealed the victim's name. The victim's father then commenced a civil action against the broadcasting company for invasion of privacy premised upon the statutory violation and the common law. The Georgia Supreme Court later upheld the common law tort aspect of the case[1] against the broadcasting company's claim that its First Amendment freedom of expression precluded the imposition of liability.

This Court reversed on quite narrow grounds:

> Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case represents, namely, whether the State may impose

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[1] The Court found that the Georgia trial court had erred in concluding that the statute conferred a private civil right of action. This fact also distinguishes the instant case from *Cox Broadcasting*, because the Pennsylvania Legislature expressly conferred a private right of action for violations of the confidentiality safeguards of the wiretapping statute, and it is upon this express statutory right of action that the Boettger claim was based.

> sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

Cox Broadcasting, supra, 420 U.S. at 491.

The rationale for invalidating the Georgia statute was expressed as follows:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.
>
> * * *
>
> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.

Id., 420 U.S. at 495-496.

Cox does not invalidate the Pennsylvania statute involved here, for several reasons. In *Cox*, the privacy

interest at stake was mere identity: a person's name. Here, the privacy interest protected by the statute was one well-recognized and protected throughout numerous state and federal statutory enactments: the right to conduct telephone conversations in private, free from the intrusions of government except under extraordinarily limited circumstances necessitated by the need for societal protection through criminal law enforcement. Indeed, the intrusion made subject to civil liability was not merely the violation of privacy implied by eavesdropping, but rather the wholesale broadcasting of the contents of private conversations on the pages of a newspaper of general circulation.

The name of the rape victim in *Cox* was presumptively available to the press through a variety of news-gathering techniques, and happened to be obtained from the type of public record ordinarily available and open to the public: a criminal indictment.[2] In stark contrast, the private information published here – a transcription of the telephone conversation intercepted by the State – would not even have existed but for the Wiretapping and Electronic Surveillance Control Act.[3]

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[2] While *Cox* does not so indicate, the appearance in the criminal indictment of the name of the victim might well have been a *requirement* of Georgia law; the accused might well also have a constitutional right to know the identity of the accuser under the Confrontation Clause and other protections of the Sixth Amendment.

[3] The creation of this transcription, and thus the private information published, was carefully conditioned upon confidentiality strictures of the highest order by the Legislature. There is serious question whether the Legislature would ever

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Also, the privacy protection afforded by the Georgia statute involved in *Cox* was entirely one-dimensional, *i.e.*, the only place it sought to preserve the privacy of the victim's name was at the door of the news media. There were no other restrictions on the public availability of the victim's identity, and in fact, the names of such victims appear to have been universally displayed for public inspection on public records. In the instant case, unlike *Cox*, the information was entirely withheld *by statute from the public domain* until its actual admission into evidence in a criminal proceeding. The information was further made subject to detailed statutory procedures explicitly designed to safeguard the privacy of the conversations until that time. *See, e.g.*, 18 Pa.C.S.A. §§5714(b) and 5715. As recognized by the trial court, this case does not genuinely present the issue of whether the press has the right to publish information in public records ordinarily available to the public. It instead presents the issue of whether the press, unlike any other member of the public, had the right to exploit the unlawful act of the District Attorney in disclosing the intercepted conversations by improperly placing a transcript in a file which the Newspaper's reporter was permitted to inspect. The Pennsylvania Legislature cannot be criticized, as was Georgia's in *Cox*, for a failure to "respond by means which avoid

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have sanctioned the serious intrusion into privacy implied by State power to intercept telephone communications without its concomitant absolute prohibition on disclosure outside of a *criminal judicial* proceeding. *See,* 18 Pa.C.S.A. §5717(c).

public documentation or other exposure of private information". The Pennsylvania statute does just that: it prohibits any disclosure whatsoever of the intercepted conversations except to other law enforcement officers as needed for their official duties, or as evidence in the course of a criminal proceeding.

Unlike *Cox*, it cannot be suggested that "by placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served". Indeed, the diametrically opposite conclusion is compelled here because the transcripts surfaced in the office of the clerk of criminal courts only as a result of the direct violation of the statute authorizing the creation of the "information" in the first instance.

Finally, the Court must consider the nature of the "public record" or "court files" involved here. In *Cox*, the record was an indictment, an official written accusation found and presented by a legally chosen and sworn grand jury to a court of record, charging named defendants with various unlawful acts. Such a document is an exemplar of the type of public record of the manner in which criminal proceedings are conducted which must be subject to public scrutiny to guarantee fairness. *Cf., Florida Star*, 57 U.S.L.W. at 4818. In the instant case, the "public record" consisted of a completely unofficial and unverified transcript of an intercepted private telephone conversation, a document which on its face purported to be the type of information whose disclosure was proscribed by statute. The transcript was unlawfully

attached to an answer filed by an assistant district attorney[4] in response to a pretrial motion for relief and discovery. In fact, not only was the transcript wrongfully attached to the answer, but the pleading itself was not a necessary part of the clerk's file. *See* then-existing Pa. R. Crim. P. No. 308.[5] Surely this was not the type of "court record" which this Court intended to embrace by the phrase "official court records open to public inspection" which "by their very nature are of interest to those concerned with the administration of government. . . ." *Cox, supra,* 420 U.S. at 495.

Nor can the Newspaper seriously urge that Mr. Boettger's private telephone conversations are the "basic data of government operations" which this Court in *Cox* recognized the press has a "great responsibility" to report. *Cox,* 420 U.S. at 491-2. To the contrary, private telephone conversations are precisely *not* the "basic data of government operations". Instead, the privacy of telephone conversations is universally secured by law, subject only to extraordinarily limited exceptions. Indeed, the Pennsylvania Legislature preserved the confidentiality of even

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[4] The trial court charitably described the conduct of the district attorney as "inadvertent", recognizing nonetheless that it was unlawful: "the district attorney's safekeeping of the recordings was in total non-compliance with the governing statute". Appendix D to Pet. for Cert. at 2d, n.2.

[5] This rule was rescinded in 1983. At the time of the events here, the Rule provided in relevant part as follows: "(a). No answer to a pretrial motion is required unless ordered by the Court. Failure to file an answer shall not constitute an admission . . . unless an answer has been ordered by the Court".

such lawfully intercepted communications, permitted disclosure only to investigative or law enforcement and judicial officers for limited purposes, and imposed sanctions applicable to *any* person – including law enforcement officers – who unlawfully used or disclosed any intercepted communication. This State – through its political institutions – thus struck a balance among the competing interests: the law enforcement need for electronic surveillance, privacy interests, and the interests of the public to know and of the press to publish, as required by *Cox*.[6] *See Cox, supra*, 420 U.S. at 496.

The second case upon which the Newspaper relies is *Landmark Communications, Inc., supra*. There, this Court answered in the negative the question "whether . . . Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes". While, unlike in *Cox*, the statutes involved in *Landmark* did attempt to safeguard the confidentiality of the published information from its very inception – not merely at the doorstep of the media – the decision emphasized the First Amendment right of the press to report information concerning the performance of *public*

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[6] Indeed, the section of the statute extending a private right of action for unlawful disclosures also provides an absolute defense to liability if the actor "acted in good faith reliance on a court order or the provisions of this chapter". 18 Pa. C.S.A. §5725(c). In the Boettger trial, the Newspaper utterly failed to establish its entitlement to this defense.

duties by *public officials* free from fear of *criminal prosecution by the State itself*. This Court observed that the issue it was deciding was a "narrow and limited" one, *Id.* 435 U.S. at 837, and declined to "adopt the categorical approach" urged by the newspaper, *i.e.*, that "truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanction by the First Amendment". *Id.*, 435 U.S. 838-9.

Three circumstances of the *Landmark* case support this Court's narrow holding there and distinguish it from the instant case. First, it involved the imposition of *criminal sanctions by the State*, not a statutory civil privacy action for damages brought by a private individual. Second, it involved the publication of information relating to *secret governmental proceedings*, not the contents of a private telephone conversation. Third, it involved the performance of *public duties by a public official*, not the private conduct of a private individual. These circumstances led the Court to "conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment" since the publication "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect". *Id.*, 435 U.S. at 839. When one considers that the First Amendment was the response of the independent colonies to the use in England of Star Chamber proceedings to punish critics of the government for what was then called seditious libel, the holding of *Landmark* becomes manifestly proper. There is, as plainly, no reason for extending the narrow constitutional holding of Landmark to the unusual, if not unique, facts of the instant

case. Although these facts *involve* government operations in the sense that the State's interception of the communications created the "information" which the Newspaper reported, there is no issue here, as there was in *Landmark*, of "subjecting the police, prosecutors and judicial process to extensive public scrutiny and criticism". *Landmark*, 435 U.S. at 839, quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Instead, the publication for which the civil action was commenced was solely the content of a private telephone conversation.

Nor does *Oklahoma Publishing Co. v. District Court in and for Oklahoma County, Oklahoma, et al.*, 430 U.S. 308 (1977) support the Newspaper's claim here. There, a pretrial order prohibited the publication of the identity or photograph of a minor child in connection with a juvenile proceeding. The name of the minor was disclosed in open court, with members of the press and other public present, despite the power of the court to close such juvenile proceedings to the public. Under various clearly applicable precedents, this Court concluded that there can be no restriction on the right of the press to report information adduced as evidence in a hearing or trial open to the public, or to report what transpires in a public judicial proceeding. *Oklahoma Publishing*, 430 U.S. at 311. But if the contents of Mr. Boettger's telephone conversations had been presented as evidence in open court in a trial or hearing open to the public, this case would not be before this Court.

The fourth case claimed by the Newspaper to require reversal here is *Smith v. Daily Mail Publishing Co., et al.*, 443 U.S. 97 (1979), also involving disclosure of the name of a minor involved in a juvenile proceeding. There, this

Court affirmed the issuance of a state court writ prohibiting county court officials from taking action on a criminal indictment charging two newspapers with violating a West Virginia statute making it a crime for a newspaper to publish the name of a minor in connection with a juvenile proceeding without court approval. This Court held that, in such circumstances, the State must demonstrate that the punitive action was necessary to further the asserted state interests, and that the asserted interest in protecting the anonymity of a juvenile offender was insufficient to justify the imposition of criminal penalties upon the press for reporting truthful information lawfully obtained about a matter of public significance.

Numerous factors distinguish *Daily Mail* from the instant case. First, the *Daily Mail* decision flatly noted that no privacy interest was at stake there: "there is no issue here of privacy". *Daily Mail, supra,* 443 U.S. at 105. But in the instant case, it is precisely privacy interests well-recognized by law that the Pennsylvania statute vindicates.

Second, *Daily Mail* involves the imposition of *criminal* penalties, which this Court found were unwarranted in view of the interest the State sought to protect. *Daily Mail,* 443 U.S. at 104 ("The magnitude of the State's interest in this statute is not sufficient to justify application of a *criminal penalty* to respondents") ("there is no evidence to demonstrate that the imposition of *criminal penalties* is necessary to protect the confidentiality of juvenile proceedings")[emphasis supplied].

Third, the Court noted that the statute's *approach* failed to pass constitutional muster because it applied

only to disclosures by *newspapers*, leaving television and radio broadcasts untouched. In *Daily Mail*, the name of the juvenile whose disclosure in a newspaper was criminalized was lawfully broadcast by three radio stations before one of the respondent newspapers published it. In the instant case, the statute prohibits *any* person – including investigative and law enforcement officers – from disclosing the contents of intercepted communications except in the manner and for the purposes mandated by the statute. Thus, the Newspaper here was subject to no more restriction than even those State officials directly entrusted with safeguarding the confidentiality of the intercepted communications.

Finally, the interests which this Court in *Daily Mail* was required to weigh against the First Amendment rights implicated in an indictment of news media for publication of lawfully obtained information were simply not vital enough to support the criminalization. As we discuss *infra*, pp. 20 to 26, the State interests involved here include its ability to utilize electronic surveillance for law-enforcement purposes; also, unlike *Daily Mail*, which involved no privacy interests whatsoever, this case directly implicates the individual right of privacy in telephone communications. Particularly in view of the fact that the West Virginia statute permitted other forms of mass media such as television and radio to broadcast with impunity the name of the juvenile offender, it was "difficult to take very seriously [the State's] asserted need to preserve the anonymity of its youthful offenders". *Daily Mail*, 442 U.S. at 110 (Rehnquist, J., concurring). In the instant case, even law enforcement officials are subject to civil actions for wrongful disclosures.

Thus, *Daily Mail* does not control the outcome of this case and establishes no applicable "settled First Amendment principles" from which the Pennsylvania Supreme Court "dramatically departed".

Finally, there is the *Florida Star* decision which the Newspaper repeatedly claims "mandates reversal". Pet. for Cert. at 8, 11, 22. The *Florida Star* majority analyzed the *Florida Star* case with reference to a particular "limited First Amendment principle": "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order". *Florida Star*, ___ U.S. ___, 57 U.S.L.W. at 4818.[7] But here, the information was a private telephone conversation, and did not, *per se*, concern the operation of government. In such circumstances, this Court recently stated:

> When the subject of [the information] is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the government is up to', the privacy interest . . . is at its apex while the . . . public interest in disclosure is at its nadir.

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[7] *But see, Florida Star*, 57 U.S.L.W. at 4822 ("Th[is] rule the Court takes as a given was thus offered only as a hypothesis in *Daily Mail*; it should not be so uncritically accepted as constitutional dogma".)(White, J., dissenting).

4382 (1989) (also recognizing privacy interest in compilation of criminal record information each component of which had already been placed in public domain).

Florida Star also noted that the government retains "ample means" of safeguarding privacy interests, and may "classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damage remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination". 57 U.S.L.W. at 4818-19. Indeed, Pennsylvania did all of those things in its Wiretapping and Electronic Surveillance Control Act. But those "ample means" were inadequate in fact.

Nevertheless, these features of the Pennsylvania statute clearly distinguish this case from the statute found constitutionally offensive in *Florida Star*. The Florida statute involved there apparently made it a crime only to "print, publish, or broadcast . . . in any instrument of mass communication" the name of a rape victim. *Florida Star*, 57 U.S.L.W. at 4816. Thus, the prohibition was limited to press publication or broadcast. And it is presumably for this reason, among others, that Justice Scalia was moved to observe in his *Florida Star* concurrence that "this law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself". *Florida Star*, 57 U.S.L.W. at 4821 (Scalia, J. concurring). Not so here: Pennsylvania's prohibition of disclosure of State-intercepted communications is quite nearly absolute, and applies with equal force to the government, to the press, and to any other person. It does not target mere press publication, but to any invasion of the

privacy interest involved in private telephone conversations. This fact also demonstrates that the Pennsylvania statute avoids the defect this Court noted in the statute involved in *Florida Star*: "underinclusiveness" and its failure to "satisfactorily accomplish its stated purpose". *Id.* at 4820. Unlike Florida, Pennsylvania did all it could to prohibit public disclosure, short of not intercepting any wire communications at all.

Florida Star also notes with concern the possibility of "timidity and self-censorship which may result from allowing the media to be punished for publishing certain truthful information". *Florida Star*, 57 U.S.L.W. at 4819, citing *Cox Broadcasting*, 420 U.S. at 496. This concern is premised on the "implied representation of the lawfulness of dissemination". *Florida Star, supra*. Yet there is no "implied representation" which could be relied on by the Newspaper here in the face of the statute which clearly made such disclosure unlawful, and which, like every citizen, the Newspaper must know at its peril. Unlike *Cox, Landmark, Daily Mail, Oklahoma Publishing*, and *Florida Star*, the Newspaper had access to the information it published only as a result of a violation of law under circumstances in which the law clearly declared that *further* dissemination was also prohibited. And in any event, whatever concern with "self-censorship" may be justified in the abstract, it is also clear here that the Newspaper was not timid in the slightest. In fact, the Newspaper's reporter boldly declared that even if he had known that his conduct violated the law, he would have done it anyway. Reproduced Record below, at 274a – 275a (Trial Transcript). Surely requiring the Newspaper, like every other citizen, to inquire what the law is or violate it at its

peril, is no more invitation to "self-censorship" than requiring it to make inquiries into the truthfulness of what it prints in order to avoid damages for libel.

Thus, neither does *Florida Star* compel the result sought here by the Newspaper.

II. UNRESTRICTED POWER OF THE MEDIA TO PUBLISH INFORMATION UNLAWFULLY DISCLOSED TO IT WOULD POSE GRAVE IMPLICATIONS FOR A WIDE VARIETY OF INTERESTS PROTECTED BY CONFIDENTIALITY PROVISIONS IMPOSED BY LAW.

Numerous state and federal statutes maintain the confidentiality, in varying degrees, of a wide variety of types of personal information. The rule truly sought here by the Newspaper is that the media are free to publish and broadcast – unrestrained even by the imposition of claims for actual damages – any such personal information, no matter how sensitive or private, so long as the Newspaper obtains the information in a manner in which the Newspaper *itself* does not violate the law and so long as the information finds its way into some article of a matter of public interest.[8]

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[8] The "first inquiry" of *Florida Star* is whether the newspaper "lawfully obtained truthful information about a matter of public significance". 57 U.S.L.W. at 4819. The requirement is apparently satisfied when "the article *generally* as opposed to the specific identity, contained within it, involved a matter of . . . public import". *Id.* Thus, under this rule if followed to its logical conclusion, a Newspaper would be free to publish the name of an adoptive child and his or her abandoning mother if

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We select here just a sample of the types of information whose widespread disclosure – otherwise prohibited by statute – would be permitted by the Newspaper's expansive reading of the First Amendment.

For example, Pennsylvania's "Controlled Substance, Drug, Device and Cosmetic Act", 35 P.S. §780-101, *et seq.* provides for the expunction of records of arrest under the Act where the charges are withdrawn or dismissed or if the person charged is acquitted. 35 P.S. §780-119(a). The Act further provides that "No person shall be permitted to learn of an expunged arrest or prosecution, or of the expunction, either directly or indirectly". *Id.*, 780-119(b). Also, "any person, except the individual arrested or prosecuted, who divulges such information in violation of this subsection shall be guilty of a summary offense". *Id.* But under the rule which the Newspaper seeks, it would be perfectly proper for the Newspaper – unlike any other member of the public – to publish the name of a person whose arrest was expunged so long as it got the information through someone *else*'s criminal act. Under the Newspaper's rule, it would involve a "matter of public importance", to wit: a criminal investigation.

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it got the information "lawfully" but through a third person's statutory violation, and if the identities were published in an article about adoptions generally, a matter of "public import". Similarly, a Newspaper could publish, free of damages claims for invasion of privacy, the identity of an AIDS-afflicted youngster, so long as it somehow learned the information through a third person's breach of physician-patient confidentiality, and if it published the identity in an article about AIDS generally, a "matter of public import". We do not believe this Court intended such deep and expansive intrusions into personal privacy.

Similarly, the law of many states prohibits and makes actionable the public disclosure of confidential business information or trade secrets. But according to it, a Newspaper, unlike any other person, could publish to the world at large with impunity such confidential information so long as it received it through someone else's breach of fiduciary obligation, and so long it did so in connection with a "matter of public importance", which could conceivably be an article about the impending business plans of a large local employer.

We have by no means touched the perimeters of the societal damage and disruption which could be the result of the Newspaper's asserted claims.

III. THE INTERESTS OF THE COMMONWEALTH OF PENNSYLVANIA IN THE PRIVACY AND REPUTATION OF ITS CITIZENS, AND IN ITS CAPACITY TO FIGHT CRIME WITH THE USE OF WIRETAP INFORMATION AUTHORIZED "THROUGH A PERVASIVE LEGISLATIVE SCHEME UNCOMPROMISINGLY DELINEATING AND LIMITING ITS COLLECTION AND USE", ARE OF SUFFICIENT MAGNITUDE TO JUSTIFY THE EXTREMELY LIMITED RESTRICTIONS ON FIRST AMENDMENT PROTECTIONS PRESENTED BY THIS CASE

There is a significant State and public interest in the continued availability of electronic surveillance as a powerful instrument of law enforcement. But electronic surveillance was sanctioned by the Pennsylvania Legislature – and by the Congress of the United States of America in the instance of the federal wiretapping act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18

U.S.C. §2510 *et seq.* – only because of the contemporaneously created use and disclosure limitations.

This interest in the availability of surveillance for law enforcement purposes, together with the interest in the State-constitutionally protected privacy of telephone conversations and in individual reputation which the Pennsylvania Legislature plainly intended to protect, provide a constitutionally sufficient foundation for the imposition of money damages against all persons, including newspaper publishers, who willfully violate the legislative safeguards.

The conflict between governmental interests in the ability to intercept and to preserve the security of wire, electronic and oral communications, and the press' First Amendment rights, if any, to access to those interceptions, has always been resolved in favor of governmental power to preserve the confidentiality of the interceptions until public disclosure has been authorized by a judge. *See, e.g., United States v. Cianfrani*, 573 F.2d 835, 856-857 (3rd Cir. 1978):

> Congress' overriding interest in protecting privacy to the maximum extent possible is evident in Title III. The legislative history of the statute emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement needs that the statute also sought to effectuate. Similarly, the complex and overlapping provisions are strong evidence that Congress intended to regulate strictly disclosure of intercepted communications, limiting the public revelations of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances.

> Moreover, protection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.
>
> We believe that the interest in protecting the privacy of communications is sufficiently weighty to justify some limitations in certain circumstances on the general right of access to court proceedings. And we believe that the circumstances of this case present the required strict and compelling necessity to justify a limitation on public access to the hearing held below. Only by allowing such limitations can we effectuate the congressional concerns evident in Title III and preserve the strength of that statute's provisions governing disclosure.

See also, Commonwealth v. Frattarola, 336 Pa. Super. 411, 419, 485 A.2d 1147, 1151-52 (1984)("The Pennsylvania wiretapping statute, 18 Pa.C.S.A. §§5710-5726, contains disclosure provisions similar to those found in Title III. The state act also limits disclosure until a determination of the lawfulness of the interception is made. Thus, the state statute, like the federal statute, prohibits public access to those portions of the transcript of the *Starks* hearing in which the contents of the tape recordings are discussed.") In *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct.

2210, 81 L.Ed.2d 31 (1984), this Court recognized that the state interest in the use of intercepted telephone conversations as evidence and in protecting the privacy interests of individuals against invasion by press publication of the contents of those communications "may well justify closing portions of a suppression hearing to the public" during which the contents of the tapes will be disclosed, even over the objection of defendants raising their Sixth Amendment right to a public trial.

While these cases address the issue of press *access* as opposed to press *publication* rights, it is clear that significant state and federal interests are presented by this case which go well beyond those articulated in *Cox, Oklahoma Publishing, Daily Mail* or *Florida Star*. The Supreme Court of Pennsylvania has described the Pennsylvania Wiretapping and Surveillance Control Act as "a pervasive scheme of legislation which suspends an individual's constitutional right of privacy only for the limited purpose of permitting law enforcement officials, upon a showing of probable cause, to gather evidence necessary to bring about a criminal prosecution and conviction. The statute sets forth clearly and unambiguously by whom and under what circumstances these otherwise illegal practices and their derivative fruit may be used." *Boettger v. Loverro*, ___ Pa. ___, 555 A.2d 1234, 1236-37 (1989). In conclusion, the Court stated:

> [T]he privacy interest we now consider consists of information gathered in temporary derogation of a Pennsylvania citizen's right to privacy and protected by our Commonwealth through a pervasive legislative scheme uncompromisingly delineating and limiting its collection and use. Weighing those interests against those contained

> in the First Amendment's guarantee of freedom of the press, we perceive it readily apparent that Pennsylvania's interest in protecting its citizen's rights far outweighs the negligible effect the Act's blanket prohibition on disclosure creates. To understand our rationale in minimizing the interest of the newspaper, it is important to bear in mind that, but for the enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited. From this we reason that *only* when the protected information is disseminated either through an order of court unsealing it or though its use as evidence in an open court proceeding does the media's interest rise above those of the Commonwealth and its citizens.
>
> Because we find no fault with the explicit language of the Act, we hold that information validly gathered pursuant to the provisions of the Act may not be disclosed, except under the limited mechanisms found in the Act, even though one not authorized to disclose such information obtains it through inadvertence or other means.

Id., ___ Pa. at ___, 555 A.2d at 1240 (emphasis in original). Given the interdependence of the statutory provisions authorizing interception and those limiting use and disclosure, if the federal and state governmental interests in strict limitations on use and disclosure cannot withstand constitutional scrutiny at the suit of the press, then the entire statute, including the legislative authorization for law enforcement officials to engage in the interception of wire, electronic, and oral communications, must fall as

well.[9] *See* 1 Pa.C.S.A. §1925, entitled "Constitutional construction of statutes", which provides:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, *unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application,* that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; *or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.*

See Heller v. Frankston, 504 Pa. 528, 475 A.2d 1291 (1984)(holding a health care malpractice arbitration act unconstitutional in its entirety where its provisions were not "distinct", but "so interwoven as to be inseparable.") It is self-evident, we believe, that the strict prohibitions on use or disclosure of intercepted wire and electronic

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[9] The comprehensiveness of the legislation at issue, and the interrelatedness of the interception and use and disclosure limitations, would mandate a second legislative look at the entire "pervasive legislative scheme" if this Court were to hold that the news media can disseminate the contents of wiretaps if governmental efforts to maintain confidentiality fail. Even after that second look, it is far from clear that legislative reapproval of the Act after the creation of a news media "exception" would survive the next challenge: that the Act denies equal protection of the laws by permitting the enforcement of the civil action provisions of the Act against the government and the general public, but not against the media.

communications are "essential" to and "inseparably connected with" those legislative provisions authorizing the interceptions themselves, and that the legislation authorizing interceptions is incomplete, and incapable of being executed in accordance with the legislative intent, unless confidentiality can be ensured.

IV. CIVIL LIABILITY UNDER THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT REQUIRES A WILLFUL VIOLATION. DEFENSES INCLUDE GOOD FAITH RELIANCE UPON A COURT ORDER OR UPON THE ACT ITSELF. THIS CASE DOES NOT PRESENT ISSUES OF STRICT LIABILITY.

Petitioner had standing, as a newspaper publisher, to seek and obtain a court order authorizing public access to and public disclosure of the contents of intercepted telephone conversations, or to secure an explanation for the absence of a seal on the transcript of the wiretap as required by the Act. It chose not to do so. The newspaper reporter who wrote the article making the unlawful disclosure testified at trial that it did not matter to him that the state had a law which prohibited public disclosure of intercepted telephone conversations without court authorization or the introduction of the intercepted conversations into evidence in a criminal proceeding. The trial court found that Petitioner had no specific grounds for believing that press publication of the wiretap transcripts was lawful; the court was satisfied that Petitioner's conduct was marked by a careless disregard as to whether or not it had a right to publish the contents of private

telephone conversations. *See, e.g., United States v. Murdock*, 290 U.S. 389, 394-96, 54 S.Ct. 223, 225-6, 78 L.Ed. 381 (1933); *Citron v. Citron*, 539 F. Supp. 621, 624-5 (S.D. N.Y. 1982). Quite obviously, the requirement of willfulness in the sense of careless or reckless disregard for a legal obligation satisfies whatever requirement of scienter can be discerned from the *Florida Star* case.

Moreover, the information disclosed in this case is by its very nature unlike that disclosed in *Florida Star*, and therefore does not involve the factual issues which this Court in *Florida Star* suggests may not be the subject of irrebuttable presumptions. Unlike the identity of a crime victim, the disclosure of which may or may not involve actual invasion of privacy issues, the content of intercepted wire or electronic communications involve privacy interests by their very nature. As stated by the Supreme Court of Pennsylvania:

> To understand our rationale in minimizing the interest of the newspaper, it is important to bear in mind that, but for the enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited.

Boettger v. Loverro, ___ Pa. at ___, 555 A.2d at 1240.

But for specific legislative authorization, telephone conversations are private and free from interception. Since the right to intercept and to make a record of those private conversations is purely a creature of the legislature, we submit that a prohibition on dissemination of the contents of intercepted conversations can be imposed by

the legislature without a specific factual determination on a case-by-case basis that such conversations are indeed private.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

*Charles W. Elliott
Thomas R. Elliott, Jr.
Poswistilo, Elliott & Elliott
1101 Building
11th and Northampton Streets
Easton, Pennsylvania 18042
(215) 258-2374

* Counsel of Record